Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-207

MARVIN R. COLE, ARTHUR A. FISCHER and
COLE, FISCHER & ROGOW, INC.,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming judgments of conviction against all petitioners under 18 U.S.C. § 371 and 26 U.S.C. § 7201, and against petitioner Fischer under 26 U.S.C. § 7206 (1) entered against them in the United States District Court for the Southern District of New York.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is reproduced as Appendix A, *infra*, pp. 1a-23a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1972 (App. B, *infra,* p. 24a). A timely petition for rehearing, with a suggestion that it be heard *en banc,* was denied on July 6, 1972 (App. C and D, *infra,* pp. 25a-26a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

QUESTIONS PRESENTED

1. Whether the admission into evidence of a prior conviction, subsequently vacated on constitutional grounds, deprived petitioners of due process of law where its use might well have influenced the outcome of the case?

2. Whether, following 15 months of illegal electronic surveillance, the government must prove that its decision to focus and its trial evidence had an independent source, or whether it may merely show that it "would have" focused on petitioners and "would have" found its trial evidence even if it had not obtained information illegally?

STATEMENT

Petitioners were convicted by a jury of conspiring from September 1961 through June 1965 to evade part of the income taxes of petitioner Cole, Fischer & Rogow, Inc. ("CFR") and of petitioners Cole and Fischer individually. Cole was convicted on four substantive counts of evading income taxes and CFR was convicted on two such counts. Fischer was convicted on two substantive counts of evading income taxes and on two counts of signing false returns. Cole was sentenced to one year in prison on each of five counts, the terms to run concurrently; he was fined $5,000 on each count. Fischer was sentenced to three months in prison on each of five counts (the terms to run concurrently) and was fined $1,000 on each. CFR was fined $10,000 on each of three counts.

CFR was, from 1955 to 1971, an advertising agency with offices in New York and Beverly Hills. All of its stock was owned by Cole and Fischer.

In October, 1962, Cole was indicted in the Southern District of California on two counts of obstructing justice in connection with a grand jury investigation relating to CFR's client hotels in Las Vegas. Cole was alleged to have advised one Joel Benton, a former CFR employee, to claim his constitutional privilege when he appeared before the grand jury. Trial of the case resulted in a judgment of conviction on both counts, and the court imposed a fine of $1,000 to cover both counts. The conviction was affirmed on appeal (*Cole* v. *United States*, 329 F.2d 437 (9th Cir.)), and certiorari was denied (377 U.S. 954 (1964)).

The present tax evasion prosecution was instituted in the Southern District of New York in 1969. It is not necessary to set forth in elaborate detail each part of the government's case in order to consider the points raised in this petition. To summarize the facts briefly, the government's case was premised on the deduction by CFR of legal fees incurred in defense of the California charge and on what the Court of Appeals described as a "pattern of having CFR take deductions for personal expenses of Cole and Fischer" (App. A, p. 6a, *infra*). That earlier prosecution—and the present one—resulted from what is conceded to have been illegal eavesdropping by the government, massive in proportion (15a, *infra*). Although a writ of *coram nobis* based on such constitutional infringement was sought in California prior to commencement of the present trial, in part to permit Cole to testify (R. 200a-202a),[1] the gov-

[1]References to R.—a are to pages in the appendix to the record on appeal below. References preceded by "T." and "TH." are to the trial transcript and the taint hearing transcript, respectively. References to the exhibits are as follows: "GX" refers to government's trial

ernment first vigorously defended its position (R. 209a-210a), and then, after proving the first conviction at the present trial on its direct case and obtaining conviction here, withdrew its opposition and stated that "the interests of justice would be achieved by the issuance of the writ of *coram nobis.*" (R. 252a-253a.) The writ thereupon issued, the prior conviction was vacated and the indictment was dismissed. The $1,000 fine was returned.

REASONS FOR GRANTING THE WRIT

1. In 1962, petitioner Cole was indicted for obstruction of justice in the Southern District of California, a charge on which he was convicted in 1963. It is now conceded that this conviction was the direct result of illegal electronic surveillance carried on from May, 1961 through August, 1962 (15a, *infra*).

After the present indictment was filed in 1969 in the Southern District of New York, a discovery motion resulted in the production of thousands of pages of logs and reports generated by the illegal electronic surveillance.[2] Cole immediately filed a petition for a writ of error *coram nobis* with the California District Court to vacate the prior conviction based on the constitutional infringements resulting from the government's illegal conduct (R. 200a-202a). The government contended that a hearing was required,

exhibits; "DX" to defendants' trial exhibits; "GXT" to government's exhibits on the taint hearing; and "DXT" to defendants' exhibits on the taint hearing.

[2] Though called for under a pretrial order in the California case, the government concealed the existence of the illegally obtained information from the defense and from the district court (R.203a-204a) and made no disclosure to this Court when certiorari was sought. 377 U.S. 954 (1964).

and represented it would establish that all of its trial evidence was obtained from legal sources (R. 209a.-210a).

Cole's attorney asked that the Court render an immediate decision "to prevent the government from using the conviction to impeach Cole in the New York case" (R. 213a). The government urged that this might enable Cole to "tell the [New York] jury his version of the facts" (R .214a), and the court ordered a hearing to be held at a later date (R. 215a-218a). Trial of the present case thus proceeded with the validity of the prior conviction sharply in question but unresolved. On trial of the present case, the government, over vigorous objection, put the prior conviction in evidence on its direct case. Petitioner Cole did not testify.

The coram nobis hearing never took place. On May 21, 1971--after conviction had been obtained here—the government withdrew its opposition to the coram nobis petition and consented to dismissal of the indictment (R. 252a-253a). Why the government's consent to vacation of the prior conviction was delayed until after its use on trial of the present case has never been adequately explained.[3]

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[3] In its unverified consent, the government alleged that counsel had reviewed unspecified "additional records" subsequent to the filing of the coram nobis petition (R.252a.). In connection with the appeal to the court below, the government produced what it claimed were the "additional records"—copies of four internal communications between the Special Agent in Charge of the Los Angeles Office of the FBI and the Director of the FBI (the documents are reprinted at Appendix F, *infra*, 29a-38a). The government did not really claim that these "additional records" put knowledge in its hands that it did not have long before use of the prior conviction on trial of the present case; only that its counsel did not previously know. This, of course, is insufficient. *Santobello*

Shortly after the California conviction was vacated and the underlying indictment dismissed, petitioners moved for a new trial here. Denial of this motion deprived petitioners of their constitutional rights, and was directly in conflict with the clear rulings of this Court in *Burgett* v. *Texas*, 389 U.S. 109 (1967), *United States* v. *Tucker*, U.S. , 30 L.Ed.2d 592 (1972), and *Loper* v. *Beto*. U.S. , 31 L.Ed.2d 374 (1972).

In *Burgett*, this Court firmly established the principle that a conviction obtained through procedures violating constitutional standards cannot be used at a subsequent trial on another charge "either to support guilt or enhance punishment . . ." 389 U.S. at 115. *Burgett* arose from the use under a recidivist statute of a prior conviction obtained in violation of the right to counsel. This Court held that the admission into evidence of a constitutionally infirm conviction had resulted in a further deprivation of the defendant's constitutional rights which was inherently preju-

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v. *New York*, 404 U.S. 257, 30 L.Ed.2d 427, 433 (1971); *Giglio* v. *United States*, U.S. , 31 L.Ed.2d 104 (1972). Moreover, the "additional records" establish that the government played a duplicitous game from the first. For these records memorialize a *modus operandi* whereby the government would first gather information illegally and then, when prosecution seemed a likely prospect, open a new file containing none of the illegally obtained information, all with the expressed purpose of concealing the possession of such information from the courts and the defense. As unseemly as this practice may have been, it cannot be credited with causing the government to change its position in view of the fact that at the time of the coram nobis petition, the government already had all of the surveillance logs and reports. In short, the government did not need these "additional records" to learn what it had been doing for the previous many years.

dicial, 389 U.S. at 115.[4]

In *Tucker*, the defendant's previous convictions were taken into consideration in imposing sentence. Two of these convictions were subsequently determined to be constitutionally infirm. This Court held that "a sentence founded at least in part" (30 L.Ed.2d at 596) upon invalid prior convictions is constitutionally impermissible. And in *Loper*, this Court held that the use of prior void convictions for impeachment purposes deprives a criminal defendant of due process of law.

It follows from these three decisions that the introduction into evidence of Cole's constitutionally invalid conviction on the government's direct case requires reversal of petitioners' convictions. The court below, however, reached the opposite result.

The court below began its analysis by conceding that the California jury verdict was an "irrelevant fact." Nevertheless, it reasoned, once the defense introduced the California trial judge's remarks to show that he had a low opinion of the credibility of one of the government's trial witnesses in the California case, the government was permitted to introduce the conviction—not for any classic purpose such as impeachment or enhancement, and not even because it was material to any real issue at trial, but—"to show that the triers of the fact did not share the California judge's

[4] The *Burgett* principle has been held to apply where, as here, the prior conviction was void under the Fourth Amendment, as resulting from an unlawful search and seizure, *Beto* v. *Stacks*, 408 F.2d 313 (5th Cir. 1969). The court below did not rule to the contrary.

low opinion of Benton's credibility" (14a, *infra*).[5] Surely, this imposed too high a price for what was at best a marginal advance of the inquiry. The import of the ruling below is that the *Burgett-Tucker-Loper* principle may be

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[5] Though surely not dispositive of the issue, it should be noted that the defense did not choose to read the California trial judge's remarks so much as it was forced to do so. The government called Joseph A. Ball, an attorney who represented petitioner Cole in the California case. Ball testified that his fees had been paid by CFR. Cross-examination was directed at establishing whether those fees were a proper business deduction of CFR. Ball was asked to summarize the contentions of both sides at the California trial, and gave his opinion that the California charges were related to CFR's business. The government was then allowed, on redirect, to elicit Ball's recollection that Benton (the man allegedly obstructed) testified at the California trial that Cole had made the following statements to him:

> "Well, remember Jimmy Hoffa's boys are mighty rough."
>
> • • •
>
> "Joel, even if you don't care about what happens to yourself, remember this, you have got a lovely wife and family. You wouldn't want anything to happen to them, would you?"
>
> • • •
>
> "Well, Doc Stacher is the No. 1 man in the syndicate and I am his boy." (T. 466-69).

In order to counteract the inflammatory impact of this testimony, the defense then read into the record certain remarks made by the California trial judge indicating his low opinion of Benton's credibility. In response, the government introduced Cole's conviction on the California charge. The jury was never informed that it was to consider the conviction only on the limited issue for which the court below later reasoned it was admitted.

ignored on the slightest pretext.[6] Even if the court below was correct in holding that the government had a legitimate purpose in showing that the trial judge's opinion of Benton's credibility was not a shared view, the construction of a legitimate purpose for admission, as shown in *Burgett*, *Tucker* and *Loper*, does not overcome the constitutional infirmity.

Nor is there anything in this Court's opinion in *Loper* which supports the novel construction of it invented by the court below when it suggested that *Loper:*

> "recognizes that when the defense elicits certain false or misleading statements from a defense witness which directly relate to a specific criminal proceeding, the prosecutor may then be permitted to counter by proof of a constitutionally defective conviction" (15a, *infra*).

By holding that the defense's use of the California judge's remarks "invokes that principle" it *implied*—without finding—that the defense had elicited false or misleading testimony. In fact, the reading of those remarks was neither false nor misleading in any fair sense. What was read accurately recited what the judge said and was, therefore, true. The judge had said nothing else which qualified the remarks that were read; the reading was, therefore, not mis-

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[6] The court below also suggested that the defense itself had put the matter in issue, a conclusion which simply ignores the inflamatory trilogy brought forth by the government. See note 5, *supra*. A similar analysis was rejected by this Court in *Harrison* v. *United States*, 392 U.S. 219 (1968). The court of appeals there relied on the fact that the defendant had made a conscious tactical decision which resulted in error. This Court held the question was not *whether* the defendant had done so, but *why* (392 U.S. at 223).

leading. That others—*i.e.*, the jurors—did not share the judge's opinion cannot fairly transmute a truthful account into a "false and misleading" statement.

United States ex rel. Walker v. *Follette*, 443 F.2d 167 (2d Cir. 1971), relied on by the court below, provides no support for its decision. *Walker*, distinguished but not approved in *Loper* (31 L.Ed.2d at 381, n. 11), merely held that a defendant cannot elect to take the stand and perjure himself with impunity simply because the answer lies only in illegally obtained evidence:

> "If a defendant testifies, he puts his credibility in issue. If he lies in the course of his testimony, he lays himself open to attack by means of illegal evidence which otherwise the prosecution could not use against him." 443 F.2d at 170.

Cole, of course, did not testify; the circumstances present in *Walker* were absent here.

This Court recognized—in *Burgett*, *Tucker* and *Loper* —that the admission of a constitutionally defective prior conviction is inherently prejudicial. Moreover, the use of unconstitutionally obtained evidence, which Cole's California conviction surely was, is an affront to "the imperative of judicial integrity." *Harrison* v. *United States*, 392 U.S. 219, 224 n.10 (1968). In order to restore "the situation that would have prevailed if the government had itself obeyed the law" *(Ibid.)* this Court should grant certiorari and reverse the convictions.

2. Petitioners contended below that the government's decision to focus on them was the result of governmental

illegality. See *United States* v. *Schipani,* 289 F.Supp. 43 (E.D.N.Y. 1968), *aff'd.,* 414 F.2d 1262 (2d Cir. 1969), *cert. denied,* 397 U.S. 922 (1970). They also contended that the government's trial evidence was tainted and should have been suppressed. The court below rejected these contentions, finding that the government "would have" launched its investigation of petitioners even if it had not obtained information unlawfully, that the investigation "was bound to and did" develop the trial evidence and that, as a consequence, the government had met its burden of proving that both the investigation and the evidence it developed were untainted. By ignoring uncontroverted fact and substituting its own speculation as to what "would have" been, the court below failed to apply the standards established by this Court's decisions and brought itself into conflict with other circuits.

In *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920), this Court held that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all." 251 U.S. at 392. Subsequently, this Court adopted a standard by which the government's conduct is to be measured in determining whether illegally obtained evidence has been "used at all":

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is, 'whether, granting establishment of the primary illegality, the evi-

dence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)."

Wong Sun v. *United States*, 371 U.S. 471, 487-88 (1963).

The test as formulated in *Silverthorne* and *Wong Sun* is whether the government has used or exploited illegal means. The court below, however, though purporting to follow *Wong Sun*, in fact ignored it, and fabricated a hypothetical test inconsistent with *Wong Sun* and *Silverthorne*.

It is unnecessary to question the finding of the court below that the investigation "would have" been launched in any event for that finding does not answer the crucial question: Whether the investigation and the evidence resulting from it were come at by exploitation of illegality or derived, instead, from an independent source. Even the briefest review of the record demonstrates beyond doubt that the information culled from 15 months of continuous eavesdropping was, in fact, "used" to cause and to give impetus, focus and direction to the investigation. Indeed, the court below, ending its inquiry at the subjunctive, made no finding to the contrary.[7]

[7] The crucial testimony at the "taint" hearing was given by Benjamin Farber, the witness produced by the government to establish what caused the investigation leading to the indictment. Farber acknowledged that he requested the opening of the tax investigation based on both legally and illegally obtained information. The court below brushed this aside and concluded that Farber "would

On May 5, 1961, FBI agents illegally planted an electronic transmitting device in Cole's private office on CFR's premises. Through this "bug," the FBI overheard, recorded and transcribed every conversation that occurred in Cole's office from May, 1961 through August, 1962.

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have" sought the investigation based on the legally obtained information alone (20a). Documents subsequently obtained from the government–some during the preparation of this petition–raise grave doubts concerning Farber's candor and even as to whether, in choosing to produce Farber, the government produced the right witness.

As early as October 5, 1970, the defense had requested production of inter- and intra-agency "airtels," in connection with the "taint" issues. The government refused to produce the airtels (TH. 176-77) and the trial judge refused to order production (TH. 20, 176-84, 387-88, 502). Four airtels were finally produced on May 2, 1972, during the course of the appeal below (29a-38a, *infra*); two more were produced on August 2, 1972, while this petition was being prepared (39a, 40a). These airtels contain considerable new information, which might well have made a crucial difference at the taint hearing. For example, Farber's testimony that he did not know that an illegal bug was being used, but that he had "a very strong suspicion" (TH. 70-71) can best be described as equivocal. The airtels dated August 21, 1962 (39a) and September 5, 1962 (37a-38a), indicate clearly that, in fact, Farber was told of the bug by U.S. Attorney Whelan no later than late August, 1962. And the August 21, 1962 airtel states that Whelan was informed of the illegal electronic surveillance and that he planned to "personally control the handling of the Grand Jury and any subsequent prosecutions." If Whelan, in fact, personally assumed control of this matter, it would seem more likely that he–rather than AUSA Farber, then a recent law school graduate–made the decision to request a tax investigation. Since the defense had no means of knowing Whelan's involvement he was not called as a witness at the hearing, and his role in the events which followed remains completely unexplored. On the basis of this new information, at the very least, a further hearing is warranted, at which Whelan can be examined and Farber re-cross-examined as to the scope of their knowledge and the part it played in the decision to focus.

The information contained in the FBI surveillance logs was summarized in some twenty FBI reports (GXT 2-21) read by Benjamin Farber, the Assistant U.S. Attorney in charge of the grand jury investigation which led to Cole's obstruction indictment (TH. 52). Although originally undertaken for other reasons, the bug proved to be a source of vivid information concerning Cole's income tax returns.

FBI Agent Zellers, in charge of the surveillance, included the following summary in one report given to Farber:

> "LA T-153 [the bug] advised that during Cole's absence, EDWARD TORRES visited Cole's office and had a lengthy conversation with IRVING REISS. On this occasion, TORRES indicated that it was his opinion that, if the government checked TORRES' affairs with a fine tooth comb, he was certain that, when they were finished, they would find that Cole owed over $200,000 to the government. He further indicated that Cole for years had charged all of his personal expenses, as well as his family's personal expenses and living expenses, to his firm, all of these charges being made on credit cards." (GXT 19, p. 35.)

On May 23, 1962, seven days after this bugged conversation, Farber requested copies of Cole's income tax returns for 1954 through 1960 (TH. 57; DX M); the returns were forwarded to him by the Chief of the IRS Intelligence Division, Robert Lund, on May 29, 1962 (DX N).

The continued bugging produced additional intelligence concerning Cole's alleged practice of charging personal expenses to CFR, and IRS Special Agent Francis Sullivan—subsequently assigned to conduct the tax investigation—

met with Zellers in Farber's office on a number of occasions (TH. 66). On August 7, 1962, while the illegal "bug" was in operation, Lund wrote to the Chief, Intelligence Division (Manhattan), in part, as follows:

> "The F.B.I. in Los Angeles has been conducting an extensive investigation into Cole's activities and is currently using a Federal Grand Jury as an aid. The Assistant U.S. Attorney, who is handling the Grand Jury, has a voluminous file of F.B.I. reports on Cole, which indicate that Cole had charged off a substantial amount of personal expenses to business expenses. The question has now been raised as to whether or not the Manhattan Audit Division has access to copies of the F.B.I. reports and checked into the allegations." (DXT P.)

In the late summer or early fall of 1962, Farber spoke to Lou Scalzo, an attorney in the Department of Justice, and requested that an IRS investigation with respect to Cole be opened (TH. 28, 30). This request was made after Farber had read each of the FBI reports containing allegations that Cole charged personal expenses to the corporation. Farber testified that he could not recall the specific reason for the request to open an IRS investigation, but that the information he obtained from the FBI reports played a part in his request (TH. 30, 44, 90).[8]

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[8] Another part was a statement Farber obtained from Benton on June 21, 1962, indicating that Cole was receiving undeclared "gravy money" from Las Vegas casinos. This charge, however, was never investigated or substantiated.

Sullivan testified that "the request by the U.S. Attorney's office in Los Angeles was based, to my knowledge, on testimony they received that Mr. Cole was charging personal expenses to the corporation" (TH. 230), information deriving only from the illegal bug.

In a memorandum to his superiors prepared on November 13, 1963, while he was reviewing the FBI reports, Sullivan stated that the entire allegation related to the charging of personal expenses to the company (TH. 230). Following Sullivan's review of the FBI reports, he prepared a status report in which he reiterated that the request to investigate Cole was based on information that Cole was charging personal expenses to CFR (TH. 229-30; GXT 24). Again, the only source for this charge was the illegal bug. Sullivan stated that the allegation was unverified since the FBI had not examined the corporate records, and that he would have to examine those records to prove or disprove the allegations (TH. 232-33).

In April, 1965, a summons enforcement proceeding was initiated in the Southern District of California. Cole's attorneys sought to take Sullivan's deposition, and the government moved for a protective order. On April 14, the Court denied the motion, requested Cole's attorney to supply the lines of questioning and directed that the deposition go forward.

On April 16, Intelligence Chief Lund spoke with Herman Kuehl, Assistant Regional Commissioner, IRS Intelligence, about whether executive privilege should be claimed to avoid disclosure of the source of the case (DXT AH-2). Lund's memorandum of a second discussion on the same

subject is perhaps the most telling evidence on the issue of governmental exploitation of the illegality. In bold relief, it summarizes the fear of disclosure. This handwritten memorandum (reproduced, *infra*, as Appendix E), relating to a discussion between Lund, Sullivan and two supervisors, Koerner and Boewler, starkly recites:

> "Source of our invest. is related to info from illegal sources" (DXT AH-1).

This memorandum—ignored by the court below—makes clear that the government pursued this case by exploitation of information come at by illegality, and that, whatever might have been, or would have been, in other circumstances, the information obtained illegally was, in fact, "used" to cause, and to give impetus, focus and direction to the investigation and was, in fact, the source of the government's trial evidence. Thus, not only did the court below apply an erroneous standard in reviewing these Fourth Amendment questions, but it is clear that application of the correct standard leads to the opposite result.[9] For ultimately, of course, Cole, Fischer and CFR were prosecuted for having CFR deduct personal expenses—the very charges on which information was obtained from the bug.

[9] While not sufficient of itself to warrant the grant of certiorari, it should be noted that the factual premise for the lower court's "would have" conclusion is shaky at best. The court felt that the information furnished by Benton was "serious" in nature and apparently more exciting than the information obtained through the bug. However, Benton, then out of CFR's employ for some five years, related to Farber but a single eight-year-old incident. At the time of his statement, Benton had multiple legal problems and was of questionable reliability. In contrast, the information derived from the eavesdropping was fresh, indicated substantial tax liability, and because of its source, was totally reliable.

A decision by this Court is also necessary to resolve the conflict between the test adopted by the Second Circuit below and by the District of Columbia Circuit in *Wayne* v. *United States*, 318 F.2d 205, 209 (D.C. Cir. 1963), and that approved by the Ninth Circuit in *United States* v. *Bacall*, 443 F.2d 1050 (9th Cir.), *cert. denied*, 404 U.S. 1004 (1971), and by the Seventh Circuit in *United States* v. *Ruffin*, 389 F.2d 76, 79 (7th Cir. 1968), which explicitly reject the "would have" test approved below.[10] In *Bacall*, the Ninth Circuit held:

> "The question to be answered is not whether the [evidence] would have been discovered in the absence of the seizure. It is, rather, whether anything seized or any leads gained from the seizure tended significantly to direct the foreign investigations toward those [items]—whether the Customs officers had after seizure a substantially greater reason to seek those specific items than they had before the seizure. . . . Even when illegally seized evidence is a 'but for' source of the subsequent discovery of additional evidence, whether that additional evidence was come at by an 'exploitation' of the illegal seizure will depend upon the precise role the illegal seizure *in fact* played in the subsequent discovery." 443 F.2d at 1057 (Emphasis in original).

Because the decision of the court below is inconsistent with this Court's decisions in *Silverthorne* and *Wong Sun*, and because there is a conflict among circuits, certiorari should be granted.

[10] The "in fact" approach has been implicitly adopted by the Fifth Circuit. See *Phelper* v. *Decker*, 401 F.2d 232 (5th Cir. 1968).

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: New York, N. Y.
August 1972

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 817, 818, 819—September Term, 1971

(Argued May 12, 1972 Decided June 6, 1972)

Docket Nos. 72-1075, 72-1076, 72-1077

UNITED STATES OF AMERICA,
Appellee

v.

MARVIN R. COLE, ARTHUR A. FISCHER and
COLE, FISCHER & ROGOW, INC.,
Defendants-Appellants

Before: FRIENDLY, *Chief Judge*, McGOWAN* and TIMBERS, *Circuit Judges*.

Appeal from a judgment of the District Court for the Southern District of New York, Milton Pollack, *Judge*, convicting appellants, after a verdict, of engaging in income tax frauds and conspiring to do so.

Affirmed.

EDWARD M. SHAW, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Lawrence S. Feld, and John W. Nields, Jr., Assistant United States Attorney, of Counsel), *for appellee*.

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* Of the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

MYRON J. GREENE, Esq., New York, N. Y. (Peter H. Morrison, Charles A. Stillman, Benjamin Zelermyer, Julian W. Friedman, and Morrison, Paul, Stillman & Beiley, of Counsel) for *Defendants-Appellants.*

FRIENDLY, *Chief Judge:*

After a hotly fought trial before Judge Pollack and a jury in the Southern District of New York, Cole, Fischer & Rogow, Inc. an advertising agency (CFR) with offices in New York, New York, and Beverly Hills, California, and Marvin R. Cole and Arthur S. Fischer, its sole stockholders and principal officers, were convicted on seven counts of an indictment. The first count charged all three defendants with conspiring in violation of 18 U.S.C. § 371 to evade payment of their 1962-64 income taxes. Counts Two and Four charged all three defendants with evasion of CFR's taxes for 1963 and 1964 in violation of 26 U.S.C. § 7201. Counts Three and Five charged Fischer with signing false returns for the same years in violation of 26 U.S.C. § 7206 (1). Counts Six and Seven charged Cole with evasion of his own taxes for 1963 and 1964 in violation of 18 U.S.C. § 7201.[1] The court sentenced Cole to one year concurrent prison terms and Fischer to three month concurrent terms on each of the five counts on which they were convicted, fined Cole $5,000 and Fischer $1,000 on each such count, and fined CFR $10,000 on each of Counts One, Two and Three.

Appellants challenge the convictions on three principal grounds: (1) that the evidence was insufficient to support the convictions; (2) that the Government should not have been allowed to introduce certain testimony at a trial of Cole before a federal court in California for obstructing

[1] Counts Eight and Nine, charging Fischer with the same crime, were severed on the Government's motion.

justice and his conviction there, see *Cole* v. *United States*, 329 F.2d 437 (9 Cir.), *cert. denied*, 377 U.S. 954 (1964), and that, in any event, appellants' motion for a new trial should have been granted when the California conviction was set aside on *coram nobis* as having resulted in part from illegal bugging of Cole's office at CFR and various hotel and motel rooms that he used; and (3) that the decision to focus on the defendants' income tax evasion and evidence presented at the trial stemmed from the same illegal source.

I.

Although we regard the attack on the sufficiency of the evidence as bordering on the frivolous, it is necessary for other purposes to state the facts and we can dispose of the argument in that context.

The gist of the Government's case was that Cole and Fischer had caused CFR to pay, and take deductions for, items that were personal in nature, thereby understating the income of CFR, Cole and Fischer. The largest item consisted of legal fees and expenses in connection with the proceeding against Cole in the federal court in California.[2] Although the defense contended that the conduct for which Cole was convicted—persuading Joel Benton, a former CFR employee, who had been called to testify before a grand jury, to claim the privilege against self-incrimination—was intended to protect the interests of some of CFR's hotel clients and thus, in the opinion of several lawyers, was properly chargeable to and deductible by CFR, the Government's position was that Cole's motives were either friendship for Benton, as he had unsuccessfully claimed in the California proceedings, see 329 F.2d at 449, or, more

[2] The facts developed in that prosecution are summarized in an appendix to the opinion affirming Cole's conviction, 329 F.2d at 443-49.

likely, a desire to prevent his own prosecution for making false statements of his lack of significant relations with one Joseph "Doc" Stacher, see 329 F.2d at 442-43. To show that the taking of deductions for these items was something more than a pardonable error, the Government presented evidence of the efforts to disguise it. The payments of Cole's legal bills in 1963 were recorded in CFR's books as legal expense payments in behalf of a CFR client, Candygram, Inc., and fees subsequently paid by Candygram for advertising services were treated as a reimbursement for these non-existent Candygram expenses. Reuben Miller, CFR's outside accountant, testified that this had been done on the direction of Cole and Fischer. The defense countered with inconsistent statements of Miller and testimony by Fischer and two other witnesses, but the jury was entitled to credit Miller.

The other items alleged to have been illegally deducted were a large number of payments for what seemed on their face to be an outrageous pattern of expense account living. Joseph Bevacqua, a Manhattan tailor who had furnished custom-made clothes to Cole and Fischer for many years, was paid $150 twice monthly by CFR during 1963 and 1964, the payments being recorded as "T and E" (travel and entertainment). On CFR's 1963 return $3,665 in Bevacqua checks were deducted as a production expense. In December, 1964, after learning that IRS was reopening its examination of earlier years, Fischer told Miller to remove the $3,800 of Bevacqua checks from the T and E production account for that year and charge himself and Cole with an additional $1,900 of salary. No corresponding change was made for 1963. Cole and Fischer ordered custom-made Sulka ties tailored to their special lengths, and had the bills paid by CFR and charged to T and E. CFR paid and deducted numerous bills for airplane tickets for flights which, on their face, were by Cole's father and mother,

Cole's wife and children, and Fischer's mother, none of which had any apparent business purpose. Although the defense claimed that the prosecution had not established beyond peradventure that the flights were actually taken by the persons named in the invoices or tickets and that Cole's father, a retired haberdasher, had rendered services by advising how to collect delinquent accounts and entertaining clients when Cole and Fischer were too busy, the jury was entitled to accept the Government's version. CFR paid for and charged to T and E roughly $530 for a "sweet sixteen" party for Cole's daughter at his Beverly Hills home in June 1963. In February 1964 it was Fischer's turn, on a larger scale. A Bar Mitzvah reception and dinner dance was held for his son at the Astor Hotel, one of CFR's clients, at a cost of $3,676.61. CFR issued a credit invoice offsetting an equivalent amount of Astor's indebtedness; Fischer did not reimburse the firm for this. Although appellants argue that CFR was later forced to write-off certain bad debts from the Astor in excess of this bill and therefore CFR's taxable income was not understated by this transaction, Fischer's clearly was. A $275 dance music bill for the Bar Mitzvah dance was paid by CFR and charged and deducted as T and E. Similar treatment was afforded to bills for Cole's parents, wife and children at the Americana Hotel in Miami in the spring of 1963; for Fischer, his wife and two children at Grossinger's in the Catskills, from December 27, 1963 through January 1, 1964; and for three visits by Fischer and his wife (accompanied by two children on one occasion) to Kutcher's Country Club in the Catskills in 1963 and 1964. While Fischer claimed his own stays had a business purpose, this, even if believed, did not authorize a deduction for his wife and children. Finally, CFR paid, charged to T and E, and deducted the bills of a Manhattan garage for a car which was delivered to Mrs. Fischer five

days a week at her home at 10:30-11:30 a.m.,[3] and of a Beverly Hills garage for service on a car used by Mrs. Cole.[4]

Although appellants cast their argument mainly in terms of insufficiency of the evidence to warrant submission of the case to the jury, this is so plainly without merit that their real point must be another, which they mention in a lower key. This is an assertion that the judge submitted *some* items on which a finding of guilt would not be justified and therefore the entire edifice must fall since we cannot know how far these affected the verdict. The principle is sound enough in a proper case, see *United States* v. *Guterma*, 281 F.2d 742, 747-48 (2 Cir.), *cert. denied*, 364 U.S. 871 (1960), but we see no sufficient basis for applying it here. The essence of the charge was the payment of the legal fees, an issue which clearly was proper for submission, and a *pattern* of having CFR take deductions for personal expenses of Cole and Fischer. The evidence of this was so overwhelming that no one could reasonably suppose the verdict would have been different even if one or two of the nearly twenty items should have been withheld from the jury—a question on which we thus need not pass. Although the government may not have proved every dollar of income alleged by the indictment to have been concealed, proof of some lesser amount will sustain a verdict if, as here, it remains material. *E.g.*, *United States* v. *Burdick*, 221 F.2d 932, 934 (3 Cir.), *cert. denied*, 350 U.S. 831 (1955).

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[3] Once or twice a fortnight the car would be delivered at a Manhattan dress shop.

[4] CFR also did this for a car used by Mr. Cole, which the Government did not challenge.

II.

The Government apparently had intended to make a prima facie case as to the nature of Cole's interest in the California criminal proceeding simply by offering the indictment,[5] and the Assistant United States Attorney in charge of the case indicated at pre-trial proceedings that he had no intention of proving Cole's conviction. The court having reserved ruling on the admissibility of the indictment, the prosecution called Joseph A. Ball, the Los Angeles attorney who had represented Cole at the trial. Its examination of Ball consisted only of establishing the amount he had received from CFR for legal services and the fact that he had never discussed their deductibility with Cole. Attracted by this opportunity to develop from Cole's own lawyer, on cross-examination, a version of the California proceeding favorable to the defendants, defense counsel sought to examine Ball concerning the contentions of the Government there. When the prosecutor objected and the judge sensibly inquired whether the California trial record wouldn't constitute the best evidence of what the proceeding was about, defense counsel asserted that examination of the record would be an inferior method "when the issues and contentions can be briefly stated by experienced counsel who was in the case, better informed and better qualified to talk about it, and he can give us the answer so that he may be subject to any cross-exami-

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[5] It is now settled that legal expenses incurred in the unsuccessful defense of a criminal charge may be deducted under I.R.C. § 162 (a) if they are non-capital expenses which are "appropriate and helpful" for the "development of the [taxpayer's] business." *Commissioner* v. *Tellier*, 383 U.S. 687, 689 (1966). In the context of this case, the government had the burden of proving that Cole was motivated by personal reasons, rather than his interests in CFR, when he "suggested" that Benton plead the Fifth Amendment. The appellants do not object to the instructions on this point.

nation Mr. Shaw [the Assistant United States Attorney] may see fit to make." After the court overruled the Government's objection, Ball made an extended characterization of the California trial somewhat favorable to the defense theory in the New York trial. This included a statement that the contention of the Government was that the advice which Cole gave to Benton was motivated by a desire that Benton should "not advise the grand jury of things which he observed in the Cole, Fischer & Rogow office which pertained to visits from clients of theirs from the Fremont Hotel, the Sands, Mr. Stacher, and so forth" and, further, over renewed objection, that Cole's "connection in this matter from beginning to end [was] one which arose out of his connection with" the business of CFR.

Faced with what he considered a tendentious characterization of the California trial, Mr. Shaw properly accepted defense counsel's invitation to cross-examine. He began by again offering the complete record of the California trial. The defense agreed to this, subject to the excision of any portions unrelated to its examination of Ball. In order to allow defense counsel an opportunity to examine the transcript, the judge temporarily allowed it to be marked for identification only.[6] Referring to Ball's characterization of Benton's testimony, the Government was allowed over objection to elicit Ball's recollection of testimony by Benton concerning remarks by Cole which is set forth in the margin.[7-8]

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[6] Later it was received, with certain excisions not here material.

[7] (i) "Well, remember Jimmy Hoffa's boys are mighty rough. I highly recommend that you get in touch with Nate Stein right away."

The nature of the Nate Stein matter is explained in the appendix to the Ninth Circuit's opinion, 329 F.2d at 444 n.3. In summary, Stein had arranged for Benton to submit a false affidavit to the Senate Committee on Improper Activities in the Labor Manage-

Appellants' contention that the items summarized in note 7 constituted inadmissible hearsay is readily answered. Benton's testimony was offered not as proof that Cole in fact had made the declarations but as indicating the theory of the Government's case in California as shown by the testimony of its chief witness there. Appellants also contend that proof of Benton's statements violated the principle that admissible evidence should not be received if its probative value is outweighed by its prejudicial character. *Cf. United States* v. *Deaton,* 381 F.2d 114, 117 (2 Cir. 1967). The cases cited by appellants, where convictions have been reversed for violation of this principle, *e.g., United States* v. *Provoo,* 215 F.2d 531, 534 (2 Cir. 1954), and *Bloch* v. *United States,* 221 F.2d 786, 790 (9 Cir. 1955), are more illuminating in their differences from what here occurred than in their similarities. The nature of the California proceeding was central to the Government's case. Particularly after the defense had opened the door by developing what the Government reasonably considered a false description of the California trial, it was entitled to bring out the full story. It may

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ment Field that certain checks from the Teamsters Union constituted payment for a truck survey.

(ii) "Joel, even if you don't care about what happens to yourself, remember this, you have got a lovely wife and family. You wouldn't want want [sic] anything to happen to them, would you?"

(iii) Also, after eliciting Ball's recollection of Benton's statement that Cole had asked if he knew who Doc Stacher was, and his negative answer, the prosecution developed Benton's testimony that Cole had said "Well, Doc Stacher is the No. 2 man in the syndicate and I am his boy."

[8] The prosecutor went on to elicit from Ball the testimony given by Cole in California that his advice to Benton was motivated solely by friendship and the absence of any suggestion by Cole or in Ball's own summation that Cole's action was motivated by CFR's business.

be that, despite the prosecution's theory that the violent nature of Cole's alleged remarks was inconsistent with a business purpose, only the third of Benton's statements truly helped to discredit the claim that the defense of the California charge was related to CFR's business.[9] However, the first two were not highly inflammatory and the term "prejudicial" is misused in this context when applied to admissible evidence of high probative value on an essential element of the prosecution's case. See *United States* v. *Briggs,* F.2d , (2 Cir. 1972), slip opinions 2459, 2462-63. Furthermore, since this portion of the transcript was ultimately received in evidence without objection, it is impossible to understand how permitting interrogation of Ball about parts of it can constitute reversible error.

The gambit of cross-examining Ball having thus been largely checked, defense counsel's next move was to elicit on recross that the judge who had presided in California had said "at the close of the trial" [10] that if the case had been tried to him without a jury, he wouldn't have wanted to rely on Benton's testimony as compared to Cole's. This was of limited relevance, since the truth of Benton's testimony was not placed in issue in the prosecution's re-

[9] Stacher was not a client of CFR. Furthermore, Benton's testimony concerning Cole's admission of close acquaintance with Stacher was highly relevant as showing that Cole's motive in urging Benton to claim the privilege was to protect himself against a prosecution for perjury. See 329 F.2d at 442-43. Although the prosecutor in California did argue on one occasion that Cole didn't want Benton to testify because of a desire to protect clients of CFR, the Government's only burden there was to show some corrupt motive and negate Cole's "friendship" theory and did not preclude the New York jury from concluding, under proper instructions, that Cole's motivation in the California proceeding was not business related.

[10] In fact this was on sentencing.

direct examination of Ball, the purpose of which, as indicated, was merely to put before the jury a more complete picture of what the California proceedings were about. Defense counsel apparently thought that in some way the California judge's remark would weaken the effect of the prosecution's redirect by discrediting Benton, although, in strict logic, if the California judge's remark had caused the New York jury to disbelieve Benton, it may simply have revived Cole's "friendship" theory, which would have been of no great aid to the defendants in the New York case. In any event, the prosecutor did not meekly stand by; instead, he announced at a bench conference that, although up to this point he had sedulously avoided reference to the result of the California trial, he now felt required to offer the judgment of conviction in order to show that the California jury had not shared the trial judge's views with respect to credibility. To put the matter a bit more fully, the defense's cross-examination of Ball had made it proper for the prosecution to offer Benton's testimony, which had now become an important part of its case; the defense had placed the truth of Benton's testimony in issue and had sought to discredit him by offering the California judge's remark; and the prosecution felt bound to rehabilitate him in the only way it could. Judge Pollack permitted introduction of the conviction "in view of the way in which the door has been opened by the defendant," but cautioned the jury in his charge that the California conviction did not constitute "evidence of the defendants' guilt on the charges of tax evasion in this case."

Appellants attack this ruling as violating this court's formulation of the "other crimes" rule, most authoritatively expressed in *United States* v. *Deaton, supra,* 381 F.2d at 117-18. The many cases cited are simply irrelevant to the special situation here. The defense had attempted to dis-

credit the Government's evidence by showing that the trial judge would not have accepted the inferences, fairly derivable from Benton's testimony, that Cole was acting to protect Stacher, himself, or both, see n.9. While, as noted, this entire exchange was of only limited relevance on the issue of whether the California proceedings were business related, the Government was entitled to complete the picture by showing that the judge's views were not shared by the laymen whose task it was to determine credibility at Cole's California trial. The Government could have called the jurors for that purpose if they had been available; the conviction, under the judge's limiting instruction, had the same effect.

Two months before the trial in this case, Ball had instituted on Cole's behalf a *coram nobis* proceeding in the California federal court to vacate Cole's conviction on the ground that the indictment was a product of illegal electronic eavesdropping. The United States Attorney responded that the Government could prove that all the evidence used at Cole's trial had come from legal sources. A hearing was held in Los Angeles on December 30, 1970, a few days before the New York trial began. Ball at first urged the need for speedy action because of fear that the California conviction would be used to impeach Cole in the New York case. Later he indicated that while he would like an early ruling, the "possible impeachment of Cole was not the crux of the *coram nobis* proceeding," and the judge set a hearing for May 24, 1971. While appellants dispute Judge Pollack's statement, in his opinion denying a new trial, that none of this was made known to him, it is plain that defendants did not attempt to have the New York trial postponed until the *coram nobis* petition had been decided. On May 21, after the verdict in the New York trial, the Government withdrew its opposition to the *coram nobis* petition on the ground that it had discovered additional

records which had convinced it that it could not prove that the evidence came from an untainted source.[11] The California judge having vacated the conviction, defendants moved on June 3, 1971, for a new trial in this case. Judge Pollack denied the motion in an opinion.

Appellants challenge the denial on numerous grounds. They contend that but for the California conviction Cole might have taken the stand and also that since the Government had offered the California conviction in evidence, the vacating of this automatically entitles them to a new trial under *Burgett* v. *Texas*, 389 U.S. 109 (1967), *Loper* v. *Beto*, U.S. (1972), 40 U.S.L.W. 4314 (U.S. March 22, 1972), and *Beto* v. *Stacks*, 408 F.2d, 313, 316 (5 Cir. 1969), which prohibit the use of a constitutionally defective conviction in a subsequent trial to destroy the general credibility of a testifying defendant, to support his guilt, or to enhance punishment. Beyond this, appellants claim the Los Angeles United States Attorney knew all along that he could not successfully resist the *coram nobis* petition but deliberately stalled until after the New York trial, see note 11. This prosecutorial misconduct, they say, must be visited upon the prosecutor in New York, although they acquit him of personal involvement.

As in the case of their argument with respect to the use of prior convictions generally, appellants overlook the particular circumstances of this case. The California indictment and trial were an important element in the charge of tax fraud in New York, whether the California proceedings

[11] The Government has made these records available to appellants' counsel and to us in connection with this appeal. Unlike appellants, we do not see the records, and the circumstances surrounding their discovery, as demonstrating that Farber's initial request for the saturation investigation was based solely or primarily on the FBI reports, *infra*, or that the government purposely delayed its acknowledgment of the validity of the *coram nobis* proceeding.

were legal or not and whether Cole was convicted or not. When the New York trial began, the prosecutor stated that he did not intend to offer the California conviction; he was content to have the New York jury determine the issue of business relatedness from other evidence without ever knowing the irrelevant fact of what the California jury had concluded. It was the defense's introduction of the remark of the California judge on sentencing, even less relevant on the issue of business relatedness than the verdict, which allowed the Government to introduce the California conviction, the functional equivalent of testimony by the jurors, in order to show that the triers of the fact did not share the California judge's low opinion of Benton's credibility at that trial, which the defense itself had put in issue. *Cf. United States ex rel. Walker* v. *Follette*, 443 F.2d 167 (2 Cir. 1971), seemingly approved in *Loper* v. *Beto, supra,* U.S. at n.11, 40 U.S.L.W. at 4317 n.11. Even if the conviction had been vacated prior to the New York trial as obtained by illegal means, the verdict would have been admissible to show the opinion of the twelve good men, and women, and true, if defense counsel had introduced the judge's remark. It may be, of course, that if the California conviction had been earlier vacated, the defense would have followed a different trial strategy in New York. But if the defense wished to preserve any point as to the illegality of the California conviction, it should have sought a continuance pending decision of the *coram nobis* proceeding or, at least, have objected to use of the conviction as being under attack so that the trial judge could have considered whether the best course would not be to strike the California judge's remark and refuse to allow the conviction in evidence, thus placing matters back where they were before the defense got the case so far off the track of true relevance. We see no reason to order a new trial because of the now demonstrated illegal-

ity of Cole's prior conviction when it was defendants' own trial tactics that brought the conviction on the stage and they made no attempt to prevent its introduction on that ground. While *Loper* prevents the prosecution's use of a constitutionally defective conviction to impeach the defendant when the only defense "strategy" is to put the defendant on the witness stand, that decision also recognizes that when the defense elicits certain false or misleading statements from a defense witness which directly relate to a specific criminal proceeding, the prosecutor may then be permitted to counter by proof of a constitutionally defective conviction. The defense's use of the judge's remark to attack Benton's credibility likewise invokes that principle.

III.

The Government concedes that from May 5, 1961 until August 29, 1962, the FBI illegally maintained electronic eavesdropping devices in Cole's offices at CFR and in various hotel and motel rooms which he occupied. The original purpose of placing these "bugs" apparently was to assist in a full-scale investigation of Stacher, who was believed to hold a high position in organized crime and to own undisclosed interests in Las Vegas gambling establishments, with a view to a prosecution for tax evasion on a large scale.[12] However, the log for May 16, 1962, included a conversation between two of Cole's associates revealing in some detail that Cole was charging to CFR a variety of personal expenses similar to those for later years which have been discussed in Part I of this opinion. Other logs contained additional conversations with re-

[12] At some point in the Stacher investigation, the FBI compiled sufficient information on Cole to warrant a separate file with respect to his activities.

spect to the charging of personal expenses, including one item relating to the legal fees in resisting the obstruction of justice charge.

Prior to trial, appellants moved for dismissal on the grounds that the tax investigation leading to the indictment stemmed from this illegal electronic eavesdropping and that the Government would rely on tainted evidence. The judge denied this without prejudice to renewal at the close of the trial, when he would be better able to analyze what evidence the prosecution had used. The motion was so renewed and, after a four-day hearing, was denied in an opinion, 325 F. Supp. 763 (S.D.N.Y. 1971).

Since there is no claim that any evidence obtained by the eavesdropping was itself introduced because the acts forming the basis for the indictment, with one technical exception, had not yet been committed when the bugs were removed, the question becomes whether the connection between the remarks illegally overheard with the later "saturation investigation" of CFR, and the evidence thereby developed, was such as to require the grant of immunity to the defendants for income tax evasion in subsequent years.[13]

The controlling principle was stated in *Wong Sun* v. *United States*, 371 U.S. 471-487-88 (1963):

> We need not hold that all evidence is "the fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary il-

[13] Although appellants correctly point out that the conspiracy count of the indictment began on September 30, 1961, when the "bugs" were still in use, they have not cited any overt acts proven at trial which may have been directly learned by the bugs.

> legality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt 221 (1959).

We have applied that principle to varying fact situations in such cases as *United States* v. *Tane*, 329 F.2d 848 (2 Cir. 1964) and *United States* v. *Edmons*, 432 F.2d 577 (2 Cir. 1970), where we reversed convictions or dismissed indictments, and *United States* v. *Schipani*, 414 F.2d 1262 (2 Cir. 1969), *cert. denied*, 397 U.S. 922 (1970), and *United States* v. *Friedland*, 441 F.2d 855 (2 Cir.) *cert. denied*, 404 U.S. 867 (1971), where we sustained them. Nothing would be gained by repeating what was said in those opinions, with one exception. It seems not to be sufficiently realized that the *holding* of the district court in *Schipani*, 289 F. Supp. 43 (E.D.N.Y. 1968), which we affirmed, was that the Government had met its burden of showing by a preponderance of the evidence[14] that it would have launched the saturation investigation which developed the evidence leading to Schipani's conviction even if no information had been received from illegal electronic surveillance of a travel bureau. It was with respect to this—not to everything *said* in the course of a 22-page opinion by the district judge—that Judge Jameson, writing for the court, "approve[d] the legal principles applied," 414 F.2d at 1266.

Careful review of the record convinces us that the Government likewise met that burden here. Benjamin Farber, an Assistant United States Attorney in Los Angeles, was in charge of the Stacher investigation. On

[14] That this is the proper standard follows *a fortiori* from *Lego* v. *Twomey*, 404 U.S. 477, 487-89 (1972) (voluntariness of confession).

June 21, 1962, Benton came to Farber and volunteered that Cole and Stacher were close business associates, that Cole himself owned hidden interests in certain Las Vegas gambling establishments, and that Cole and Stacher frequently took "gravy money" from these without declaring it as income.[15] Benton elaborated on this in a manner described by the district court as follows, 325 F. Supp. at 770:

> Benton told Farber that during the time he was employed at Cole, Fischer & Rogow, he met a number of people at the office of the advertising agency connected with the Sands Hotel. Men from the hotel came with bundles of money on which there would be a little slip. The money would be tossed into a file cabinet. Cole told Benton that sometimes it was as much as "200,000 bucks," but "with our setup, we're not worried about having anybody steal it." Another time, on a Monday around noon, he said, a chap would come in with a black brief case, containing a flat pack of bills which was handed to Cole. The latter explained that this was the money stuffed into cans beneath the gambling tables—the gravy money that is never reported. Cole received a cut of these moneys which was not declared. Cole told Benton that he had 8⅔ points in the Sands Hotel; that this had been given to him by members of the family so that he could get into the Sands Hotel, since Cole didn't have any money and they had given him enough money so that he could buy into the Sands Hotel.

[15] Benton also narrated statements by Cole similar to those in the third paragraph of note 7, *supra*.

The appellants argue the Government did not meet its burden of proving that Benton himself was free from taint. This contention must fail. The Government demonstrated at the taint hearing below, and the district court found, that its knowledge of Benton derived from independent, legal sources.

Prior to Benton's visit Farber had been receiving regular reports from FBI Special Agent Zellers which were based in part on the contents of the logs, including a report as to Cole's charging personal expenses to CFR.[16]

Later in the summer Farber asked Louis Scalzo, an attorney in the Organized Crime Division of the Department of Justice, to request the Internal Revenue Service to undertake a "saturation investigation" of CFR. Farber testified as to his motivation as follows:

> The Benton information and the information pertaining to the Las Vegas hidden interest was, to me, the most dramatic, and the most appealing. I think maybe I was thinking in terms of gang buffeting or racket buffeting and for that reason these reasons were the types of things that seemed to make the biggest impression upon me.
>
> I, on the other hand, am sure that the other information [from the FBI reports] must have played some part.

In its letter of October 3, 1962, to the Commissioner of Internal Revenue requesting the investigation, the Department referred to information that Cole was closely associated with Stacher and that Cole acted as Stacher's representative in connection with an undisclosed interest in gambling at the Sands Hotel. This information, contained in Benton's statement, was from an untainted source. Nothing was said in regard to taking deductions for personal expenses.

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[16] The Government claims that Farber did not know the true source of the information in these reports which was described only as informant "LA T–153." The appellants contest this with some force. We find it unnecessary to resolve the dispute because Farber's knowledge whether "LA T–153" was an illegal source is irrelevant to the question of the effect of the tainted information on Farber's decision.

Judge Pollack found as a fact that Benton's statement "catalyzed the request to IRS of the desirability of investigating Cole's income taxability and returns." 325 F. Supp. at 770. We see no basis for disagreement; indeed, we think this understates the case. Assistant United States Attorneys and attorneys in the Department of Justice are obviously aware that the resources of the Internal Revenue Service do not permit saturation investigations of every taxpayer who charges a trip by his wife or children as a business expense. Such time-consuming methods of investigation must necessarily be reserved for serious cases. Failure to disclose the receipt of "as much as '200,000 bucks' " a week from a man believed to a figure in organized crime would warrant a saturation investigation; the practice, regrettably too common, of taking a business deduction of a few hundred or even a few thousand dollars of personal expenses would be left, in the first instance, to ordinary audit procedures. While Farber candidly admitted that the personal expense deductions "must have played some part" in his decision, it is clear both that he would never have sought—or obtained—a saturation investigation on that ground alone and that he would have sought it—and in fact obtained it—on Benton's information alone. Conduct is not a legal cause of an event if the event would have occurred without it. Prosser, Torts § 41 at 239 (1971 ed.).

Although, once the saturation investigation[17] was or-

[17] A Government witness characterized such an investigation as one that would "leave no stone unturned in determining the correct tax liability of the taxpayer, if any." Although the auditing procedures employed in such an investigation are not made public, 26 C.F.R. § 601.701 (b) (ii) (1972), testimony at the taint hearing by Internal Revenue Service investigators indicated that every conceivable avenue of tax evasion is thoroughly examined and, when possible, independently verified.

dered,[18] discovery of the improper deductions was inevitable, appellants contend there was a focusing on the deduction of personal expenses which resulted from the original taint. They showed, in support of this, that in the fall of 1963 Sullivan read the FBI reports on the bugging logs and made 43 pages of handwritten notes, one item of which read:

> "General comment—various unidentified sources:
>
> 'That Cole, for years, has charged all his personal expenses, as well as his family's personal expenses and living expenses, to his firm—all of these charges being made on credit cards.'
>
> "It is not indicated how these persons knew this to be a fact."

Also, after his recommendation that the saturation investigation be abandoned was rejected in the spring of 1964, he prepared a work plan, one line of which under the heading "Probable Required Inquiries" referred to "Personal expenses charged to business."

The analysis of CFR's records finally got under way on June 8, 1965 and continued through August 27. It was

[18] The investigation was long in coming. IRS Agent Sullivan, who was assigned to it, was occupied with the Stacher investigation. Also the indictment against Cole for obstruction of justice was filed in October of 1962, and Farber instructed Sullivan not to pursue the tax investigation until the obstruction of justice charge had been resolved. Not until October 1964 did Sullivan request the CFR income tax returns and records. The taxpayers resisted production of the records, and legal proceedings had to be instituted. When the Government's right of access to the records had been established, the IRS was informed, for the first time, that all corporate records prior to 1963 had been destroyed. Appellants' contention that the order directing production of the records was itself tainted by perjurious testimony by Sullivan and prosecutorial misconduct was not made below and, in any event, is without merit.

conducted under the supervision of Revenue Agent Robert Zagorin. Neither he nor any of the agents working under him had any knowledge of the bugging or of the FBI logs. His description of the many tasks he performed takes up nine pages of the hearing transcript. While he knew from Sullivan that one basis of the investigation was personal expenses charged to the corporation,[19] he had been given no specific leads and did not even reach the subject of charges for personal expenses until the third week of his study. It would be a poor "saturation investigation" that did not embrace this common method of tax evasion; indeed, one would suppose this would be among the first items even in an ordinary field audit. The short of the matter is that once it is concluded that the "cause" of the saturation investigation was Benton's lurid account of Cole's participation with Stacher in taking a share of the cash profits of Las Vegas gambling without reporting this as income, the investigation, without any assistance from the bugging, was bound to and did develop the charging of personal expenses to the business. It is immaterial that, for whatever reasons, the Government was unable to substantiate the allegations by Benton that had led to the investigation. In *United States* v. *Paroutian,* 299 F.2d 486 (2 Cir. 1962), we said that the question is not whether the government would have, in the normal course of events, discovered the evidence by independent legal sources, but whether in fact they did actually make the discovery from independent legal sources. Our holding today does not undermine that rule, because we find that the Government proved that the evidence resulted from the legal saturation investigation, rather than from any illegal information as to personal expense accounting.

The United States does not ask us to condone its illegal actions a decade ago, which indeed deserve the sharpest

[19] Another was an unexplained increase in Cole's net worth.

condemnation. We hold only that it sustained the burden of showing that its knowledge of the facts on which these defendants were convicted of income tax evasion in 1963 and 1964 was "gained from an independent source." *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392 (1920).

The convictions are affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of June one thousand nine hundred and seventy-two.

Present: HON. HENRY J. FRIENDLY, *Chief Judge*, HON. CARL MCGOWAN, HON, WILLIAM H. TIMBERS, *Circuit Judges*.

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

MARVIN R. COLE, ARTHUR A. FISCHER and
COLE, FISCHER & ROGOW, INC.,
Defendants-Appellants

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO, *Clerk*

APPENDIX C

72-1075—77

UNITED STATES COURT OF APPEALS
Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

MARVIN R. COLE, ARTHUR A. FISCHER and
COLE, FISCHER & ROGOW, INC.,
Defendants-Appellants

A petition for a rehearing having been filed herein by counsel for the appellants.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

July 6, 1972

HENRY J. FRIENDLY
Chief Judge

CARL MCGOWAN
WILLIAM H. TIMBERS
Circuit Judges

APPENDIX D

72-1075—77

UNITED STATES COURT OF APPEALS
Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

MARVIN R. COLE, ARTHUR A. FISCHER and
COLE, FISCHER & ROGOW, INC.,
Defendants-Appellants

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
Chief Judge

July 6, 1972

O Dec'd O Dis'd
L.N. - Lun 6

What we want D/J to do -

Vacate order — 46th —

or limit —

Reg Set for 28th

Corp Records —

1956 - 1963 - all except 1963 can be taken
were seized with sleeping Letts -
in both Corp & Ind. -
No assignment in the Corp. - seized —

Sully testified to Comply with Powell -
Nearing dispo -

Area of Q not to be submitted yet : yet on 28th
to Bell's office -
will postpone - Lenore might not get Q until Nov 4th -
getting no where in D/C -
whoever loses will appeal -

7213 1905 - Title 18 -

Seems as one must be called to info the Illegal Seizure

Supreme Goldfeld - N.Y.

Hirsch is a Special Dep -

CORRESPONDENCE APPROVAL AND CLEARANCE Form 1937A (10-57)

POOR COPY

[*For the convenience of the Court, Appendix E, supra, is reprinted below.*]

Sully [illegible]
L.K.–Lund

what we want D/J to do–

1) Vacate order–26th–
or limit–

2) Dep set for 28th

3) Corp records–
1956-1963–all except 1963 have been [illegible]
were sent with reopening letter
on both Corp. & Ind.–
No assignment on the Corp.–now

4) Sully testified to comply with Powell–
Necessary info.–

area of Q not submitted yet–get on 28th
fm Ball's office–
will postpone–because might not get Q until the
28th–getting no advice from D.C.–
whoever loses will appeal–

7213 1905–Title 18–

Source of our invest related to info from illegal sources

Seymour Goldfeld–N. Y.
Kiev is against Des

APPENDIX F

August 10, 1962

AIRTEL AIRMAIL—REGISTERED

TO: DIRECTOR, FBI (92-5383) *JUNE*

FROM: SAC, LOS ANGELES (92-934)

RE: MARVIN ROBERT COLE, aka.
AR
OO: Los Angeles

On 8/6/62 SA HOWARD E. ZELLERS conferred with Assistant U.S. Attorney BENJAMIN S. FARBER at Los Angeles with regard to captioned case. Mr. FARBER had requested that SA ZELLERS confer with him concerning contemplated prosecution of MARVIN ROBERT COLE on the charge of perjury arising out of COLE's appearance before the Federal Grand Jury at Los Angeles; also, prosecution on the charge of obstruction of justice arising ou of COLE's activities with respect to JOEL ROBERT BENTON, the latter having appeared before the Federal Grand Jury, at which time he pleaded the Fifth Amendment, and according to subsequent statement did so because of COLE's persistence and persuasion. The Bureau has been provided complete details with respect to BENTON in a sworn statement which was incorporated in the report of SA ZELLERS dated 7/24/62 at Los Angeles in captioned case.

Mr. FARBER, on the occasion of this—conference, raised the question as to the identity of LA T-153. It is noted that LA T-153 is a highly sensitive source, namely LA 4321-C*. Information received from this source has, from the inception of the case, been set forth in the details of the various reports in accordance with current Bureau policy and such reports have been disseminated to the U.S. Attorney's Office at Los Angeles.

Assistant U.S. Attorney FARBER was advised that the identity of the informant would not be revealed and that in the event of prosecution, the informant would not testify. Mr. FARBER then inquired as to whether the informant was a wire tap or a microphone installation. No comment was made to this inquiry.

Mr. FARBER pointed out that in the event of prosecution it would be advisable that he know the identity of the informant especially if same should, by any chance, be a wire tap or microphone installation in order that they might avoid possible complications which might naturally arise during course of trial.

Mr. FARBER pointed out that it would be entirely possible in the event of trial that the defense might make a motion for the production of all FBI reports in possession of the U.S. Attorney's Office pertaining to COLE and that such files be produced for an inspection by the court in camera to determine if there might be any evidence of a wire tap or microphone installation during the course of investigation. Assistant U.S. Attorney FARBER stated that such a motion is a definite possibility and one which might be granted by the court. It is to be noted that during the recent past in the trial of the case captioned "FRANK 'BLINKY' PALMERO, aka.; ET AL; JACKIE LEONARD, aka.—VICTIM; ET AL—EXTORTION; AR; CONSPIRACY" such a motion was made by defense counsel and Judge TOLIN ordered that all FBI reports in possession of the U.S. Attorney's Office be made available to him for the purpose of inspection in camera. It is noted, however, that in that case there was no misur utilized, thus the current problem did not exist in that particular case.

Mr. FARBER advised that if an in camera inspection were made of the reports in the COLE case, it was his opinion that the judge would, in all probability, then raise the

question as to the identity of LA T-153 and that an agent would have to answer or the government would be faced with the alternative of dismissing the case.

On the other hand, Mr. FARBER advised that if a microphone installation had been utilized by the government, then, depending on the circumstances, the U.S. Attorney's Office might see the advantage of proceeding regardless of the nature of the source and relying on the possibility of being able to prove that the information from this informant was not the original basis or source from or upon which certain pertinent areas of investigation were founded. Mr. FARBER indicated that in order to resolve questions relating to the preparation of the case, it appeared essential that he be advised concerning the identity of the informant. No commitment was made to Mr. FARBER on the occasion of this conference.

On 8/9/62 SA WILLIAM J. NOLAN conferred with THOMAS R. SHERIDAN, Special Assistant to the Attorney General, with regard to the case entitled "JAMES RIDDLE HOFFA; NATE STEIN, aka.; JOEL BENTON – MISCELLANEOUS – INFORMATION CONCERNING (ACCOUNTING AND FRAUD SECTION); AR; PERJURY (Bufile 63-7144).

It is noted that BENTON, in a sworn statement set forth in the report of SA ZELLERS referred to above, relates information concerning NATE STEIN and MARVIN R. COLE pertaining to BENTON giving false information to investigators of the Senate Committee in 1958, at which time they were investigating the activities of HOFFA. The activities of STEIN and COLE, in the opinion of SHERIDAN, clearly constitute a case of subornation of perjury—conspiracy. Assistant U.S. Attorney SHERIDAN is contemplating an indictment of STEIN and COLE on the subornation—conspiracy charge arising out of the statement of

BENTON and is giving consideration to combining with such charge an obstruction of justice—conspiracy count against COLE and IRVING REISS, such violation arising out of facts set forth in BENTON's statement that COLE and REISS persuaded BENTON to plead the Fifth Amendment before the Federal Grand Jury at Los Angeles.

It would appear that if the course of action contemplated by SHERIDAN were followed, the entire matter could be handled in the investigative file pertaining to NATE STEIN and inasmuch as there was no highly sensitive source utilized in such file, it is entirely possible that by following such course of action, the U.S. Attorney's Office can obviate any reference to COLE's investigation as well as the files pertaining to COLE which are presently in possession of the U.S. Attorney's Office at Los Angeles.

Since the inception of the Criminal Intelligence Program and the policy of dissemination to the U.S. Attorney's Offices the Los Angeles Office has not previously encountered the problems attendant in this situation which arose directly from this matter of dissemination of intelligence information. This will be the first case within this district in which prosecution will be entertained since the inception of this program. It will be the first case wherein a misur has been utilized and the information obtained therefrom has been disseminated to the U.S. Attorney's Office in accordance with current Bureau policy. It is the observation of the Los Angeles Office that intelligence information obtained from a misur is not admissible as evidence and, it appears, does not enhance the investigation by virtue of dissemination to the U.S. Attorney's Offices. In fact, it would appear that by virtue of such dissemination, coupled with the possibility of disclosure at the time of trial through an in camera inspection by the judge, that the dissemination of such information merely tends to cloud or might pos-

sibly even preclude the possibility of successful prosecution. For the Bureau's further information, it is noted that according to LA T-153 COLE, during the last two weeks, has on occasion expressed the fact that if indicted he will retain BENNETT WILLIAMS of Washington, D.C., as his attorney.

No comment or commitment has been made to the U.S. Attorney's Office concerning the current problem and none will be made pending instructions from the Bureau as to the policy which should be followed concerning such matters. It is realized that many of the Bureau offices may be in a similar position due to the dissemination of information to the various U.S. Attorney's Offices and thus the current problem might well be one that has arisen previously under the current program. Accordingly, it is requested that the Bureau advise Los Angeles as to the policy which should be followed in this matter. Pending the receipt of Bureau instructions, no commitment or comment will be made to the U.S. Attorney's Office at Los Angeles. It is pointed out, however, that the U.S. Attorney's Office is desirous of proceeding in this matter at the earliest possible moment and thus an early reply would be appreciated.

Airtel Date: 8/16/62

To: SAC, Los Angeles *JUNE*

From: Director, FBI *PERSONAL ATTENTION*

MARVIN ROBERT COLE, aka
AR

Reurairtel August 10, 1962.

The Bureau has contacted Mr. William Foley who is Acting Assistant Attorney General, Criminal Division, in the absence of Mr. Herbert J. Miller, Jr., and he was informed of the possible prosecution of the subject. Mr. Foley was advised that there had been a microphone surveillance on Cole and that this information would be made available to the United States Attorney at Los Angeles, Francis C. Whelan.

It should be noted this is a situation which has arisen on many occasions in the past in the security field and which have been successfully handled by the Department by proceeding in the prosecutive matter on a separate basis from the intelligence investigation. Mr. Foley was in complete agreement with the Bureau's position and stated that when the USA at Los Angeles is contacted regarding this matter, it would be appropriate to inform him that the Bureau had brought this situation to the attention of Mr. Foley in the Department. You should personally contact the USA on a confidential basis and inform him of the fact that we have had a microphone surveillance on Cole so that he will be in possession of pertinent information on which to render his decision as to prosecutive action.

The USA at Los Angeles should also be made aware of the fact that the information being furnished to him must be retained on a confidential basis.

You are reminded that when a substantive violation is uncovered in connection with our intelligence investigations, a substantive case should be promptly initiated. In view of the fact that there is a possible perjury violation on the part of the subject, you should submit an appropriate report to the Bureau with a perjury character. This report, of course, will not include information which has been obtained from highly confidential sources.

Advise the Bureau results of your contact with USA.

Date: 8/28/62

RADIO URGENT

TO: DIRECTOR, FBI *"JUNE"*

FROM: SAC, LOS ANGELES (92-934B)

MARVIN ROBERT COLE, AR. RE LOS ANGELES LETTER TO BUREAU DATED 8/21/62. USA WHELAN ADVISED ME 8/27/62 THAT IN HIS OPINION THE BEST PROSECUTIVE PROCEDURE TO FOLLOW AGAINST COLE WOULD BE IN CONNECTION WITH OBSTRUCTION OF JUSTICE VIOLATION INVOLVING COLE CONCERNING WHICH ORIGINAL INFORMATION WAS FURNISHED BY JOEL BENTON. WHELAN ALSO STATED HE FELT IT HIGHLY DESIRABLE TO DISCONTINUE SERVICES OF LA T-153 (LA 4321-C*) AS SOON AS POSSIBLE IN VIEW OF FORTHCOMING PROSECUTIVE ACTION. SERVICES OF LA 4321-C* ARE BEING DISCONTINUED AS OF FIVE PM PST TODAY UACB. BUREAU WILL BE ADVISED WHEN EQUIPMENT REMOVED.

9/5/62

AIRTEL AIRMAIL—REGISTERED

TO: DIRECTOR, FBI (92-5383) "JUNE"

FROM: SAC, LOS ANGELES (92-934B)

RE: MARVIN ROBERT COLE, aka.
AR

OO: Los Angeles

Re Bureau airtels dated 8/16/62 and 8/29/62.

Since the identity of LA 4321-C* was confidentially disclosed to U.S. Attorney FRANCIS C. WHELAN on 8/20/62, it appears that Mr. WHELAN has discussed the matter with AUSAs THOMAS R. SHERIDAN and BENJAMIN S. FARBER, who are the AUSAs handling the COLE matters as they pertain to NATE STEIN and to COLE personally, at least to the extent that Mr. WHELAN feels the matter should be known by them.

On subsequent contacts with these AUSAs, they have now come to the conclusion that they feel it would be preferable to waive any possible prosecutive steps against COLE on perjury charges in favor of proceeding against COLE and IRVING REISS on charges of Obstruction of Justice and also proceeding against COLE and NATE STEIN on charges of Subornation of Perjury. The AUSAs are correlating their actions along these lines. The AUSAs feel that to proceed on perjury charges could conceivable raise some questions relative to LA 4321-C* (known to them only as LA T-153) which would better be avoided.

AUSA FARBER who has been handling the FGJ on COLE has completed interrogation of witnesses for the time being and will not call additional witnesses until such time as USA WHELAN advises the AUSAs that LA T-153 has

been able to obtain other employment and has ceased any association with COLE.

At this time, AUSAs will subpoena JOEL R. BENTON, and are hoping to have BENTON telephone COLE along the lines set out in Los Angeles airtel dated 8/28/62.

In view of the above, it is contemplated that a report will be submitted under the character of Obstruction of Justice which will reach the Bureau no later than 9/14/62. The above AUSAs are currently in the process of preparing outline memoranda for further discussion with USA WHELAN and have a tentative conference date set up with him to go over this matter on 9/6/62 at which time it is expected that Mr. WHELAN will render his decision as to the advisability of proceeding along the lines set out above.

The Bureau will be kept currently advised of all important developments in this matter.

DIRECTOR, FBI 8-21-62

SAC, LOS ANGELES (92-934) *JUNE*

MARVIN ROBERT COLE, Aka
AR

Re Bureau airtel to Los Angeles 8-16-62 which was marked for my personal attention.

This is to advise that I personally discussed this matter on 8-20-62 with USA FRANCIS C. WHELAN, Los Angeles, and advised him pursuant to Bureau instructions contained in referenced airtel.

Mr. WHELAN stated that he would personally review this case with the Assistant United States Attorney handling same and would personally control the handling of the Grand Jury and any subsequent prosecutions.

FBI

Date: 8/29/62

Airtel

To: SAC, Los Angeles (92-934)

From: Director, FBI (92-5383)

MARVIN ROBERT COLE, aka
AR

ReBuairtel 8/16/62.

Referenced airtel instructed you to submit an appropriate report to the Bureau with a perjury character in view of the possible perjury violation on the part of the subject.

Advise the Bureau of the status of the Federal Grand Jury inquiry regarding Cole. You are reminded that the Bureau must be kept currently informed as to the contemplated prosecutive action against the subject.

This matter must be expeditiously handled and an appropriate report submitted to reach the Bureau no later than 9/7/62.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-207

MARVIN R. COLE, ARTHUR A. FISCHER AND COLE, FISCHER & ROGOW, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-23a) is not yet reported.

The opinion of the district court is reported at 325 F. Supp. 763.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1972 (Pet. App. B, p. 24a). A petition

for rehearing was denied on July 6, 1972 (Pet. App. C, p. 25a). The petition for a writ of certiorari was filed on August 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case the use of an earlier conviction, later vacated as tainted by illegal electronic surveillance, was proper.

2. Whether the government's evidence in this case was tainted by illegal electronic surveillance.

STATEMENT

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of engaging in income tax frauds, in violation of Sections 7201 and 7206(1) of the Internal Revenue Code of 1954, and of conspiring to do so, in violation of 18 U.S.C. 371.[1] Following conviction, petitioner Cole was sentenced to one-year concurrent prison terms and fined $5,000 on each of the five counts on which he was convicted; petitioner Fischer was sentenced to three-month concurrent terms and fined $1,000 on each of the five counts on

[1] Count One charged all petitioners with conspiring to evade payment of their 1962 through 1964 income taxes. Counts Two and Four charged all petitioners with evasion of Cole, Fischer & Rogow, Inc.'s taxes for 1963 and 1964. Counts Three and Five charged Fischer with signing false corporate returns for 1963 and 1964. Counts Six and Seven charged Cole with evasion of his taxes for 1963 and 1964. (Pet. App. A, p. 2a.)

which he was convicted, and petitioner Cole, Fischer & Rogow, Inc. was fined $10,000 on each of the three counts on which it was convicted (Pet. App. A, p. 2a). The court of appeals affirmed (Pet. App. A, pp. 1a-23a).

2. The evidence, the sufficiency of which is not challenged here, is extensively set forth in the opinion of the court of appeals (Pet. App. A, pp. 3a-6a). It revealed that Cole and Fischer were the sole stockholders and principal officers of Cole, Fischer & Rogow, Inc. (hereinafter "CFR"), an advertising agency with offices in New York, New York, and Beverly Hills, California (Pet. App. A, p. 2a). It was shown that Cole and Fischer had caused CFR to pay, and take deductions for, items that were personal in nature, thereby understating the income of CFR, Cole and Fischer.

3. The largest item of fraudulent deduction consisted of legal fees and expenses paid by CFR in connection with a 1963 federal criminal proceeding against Cole in California for obstructing justice in violation of 18 U.S.C. 1503.[2] During the prosecu-

[2] The gist of that charge was that Cole had corruptly persuaded one Joel Benton, a former CFR employee, to claim the Fifth Amendment privilege against self-incrimination before a federal grand jury (Pet. App. A, p. 3a). See *Cole* v. *United States*, 329 F. 2d 437 (C.A. 9), certiorari denied, 377 U.S. 954.

Prior to the instant trial, Cole instituted a *coram nobis* proceeding in the California federal court to vacate that conviction on the ground that the indictment was the product of illegal electronic surveillance. The United States Attorney responded that the government could prove that its evidence in that case was untainted. However, after the verdict in this

tion's case, the government called one Joseph A. Ball, the attorney who had represented petitioner Cole at the California trial. In support of its theory that the legal expenses of that trial were not deductible as being business related, the government's examination of Ball established that he had been paid by CFR and that he had never discussed the deductibility of the fees with Cole.[3] Over objection, the defense then elicited testimony from Ball on cross-examination that Cole's involvement in the California case arose out of his connection with the business of CFR and that the government's theory in that case was that Cole had acted out of a desire to protect CFR's clients (Pet. App. A, pp. 7a-8a). The government was then permitted, over objection, to elicit Ball's recollection of specific testimony by Benton concerning remarks Cole had made to him (Pet. App. A, p. 8a).[4]

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case, the government withdrew its opposition to the *coram nobis* petition on the ground that it had discovered additional records which had convinced it that it could not prove that its evidence was not tainted. (Pet. App. A, pp. 12a-13a.)

[3] Pursuant to the directions of Cole and Fischer, CFR's payments of Cole's legal bills in 1963 were recorded in its books as legal expense payments in behalf of Candygram, Inc., a CFR client, and advertising fees subsequently paid by Candygram to CFR were treated in CFR's records as a reimbursement for the alleged Candygram expenses (Pet. App. A, pp. 3a-4a).

[4] Ball testified that Cole's remarks as related by Benton were (Pet. App. A, pp. 8a-9a, n. 7):

> (i) Well, remember Jimmy Hoffa's boys are mighty rough. I highly recommend that you get in touch with

The defense responded by eliciting from Ball that "at the close of the trial" the trial judge stated that if he had tried the case without a jury, he would not have wanted to rely upon Benton's testimony as compared to Cole's (Pet. App. A, p. 10a). The prosecutor, who had consistently stated that he did not intend to offer evidence of the California conviction, then stated that he now felt constrained to offer such evidence. The trial judge ruled that, since the defense had presented the trial judge's opinion of Benton's credibility, the jury's view of it could be presented to complete the picture, and the jury's verdict in the California case was admitted (Pet. App. A, p. 11a).[5]

4. Prior to trial, petitioners moved for dismissal of the indictment on the ground that the tax investigation leading to the indictment had resulted from illegal electronic surveillance and that the prosecution would rely on tainted evidence (Pet. App. A, p. 16a). The motion was denied without prejudice, subject to renewal at the close of the trial (*ibid.*).

Nate Stein right away. [An apparent reference to arrangements for Benton to submit a false affidavit to a Senate Committee, see Pet. App. A, *supra.*]

* * * *

(ii) Joel, even if you don't care about what happens to yourself, remember this, you have got a lovely wife and family. You wouldn't want want [sic] anything to happen to them, would you?

(iii) * * * Well, Doc Stacher is the No. 2 man in the syndicate and I am his boy.

[5] In his charge, the judge instructed the jury that the California conviction was not evidence of petitioner's guilt on the instant charges (Pet. App. A, p. 11a).

At the conclusion of the trial, the motion was renewed and, after a four-day hearing, denied in a comprehensive opinion. *United States* v. *Cole*, 325 F. Supp. 763. The evidence at the hearing revealed that from May 5, 1961, until August 29, 1962, the Federal Bureau of Investigation carried out illegal electronic surveillance in petitioner Cole's office at CFR.[6] The surveillance was in aid of an investigation of one Joseph "Doc" Stacher, believed to be a high figure in organized crime and believed to own undisclosed interests in Las Vegas gambling establishments. Cole was believed to be the "deputy" for the undisclosed interest held by Stacher (Pet. App. A, p. 15a; 325 F. Supp. at 764-765). During the time of this illegal surveillance, Benjamin Farber, an Assistant United States Attorney in Los Angeles, was conducting two grand jury investigations—one investigating Stacher and one concerned with whether Cole had committed perjury before the Stacher grand jury (325 F. Supp. at 765). On May 16, 1962, the surveillance intercepted a conversation between two of Cole's associates to the effect that Cole was charging personal expenses to CFR. Other surveillance logs contained similar items, in-

[6] The circumstances surrounding the illegal electronic surveillance and the investigation leading to prosecution here are extensively set forth in the opinion of the district court and in the opinion of the court of appeals (Pet. App. A, pp. 17a-22a). From November, 1962 until approximately April 28, 1963, illegal electronic surveillance was also carried out in the Fremont Hotel in Las Vegas, Nevada, a hotel in which Cole then had a proprietary interest (325 F. Supp. at 764-765).

cluding one relating to the legal fees in the California criminal case (Pet. App. A, pp. 15a-16a).

On June 21, 1962, Joel Benton came to Farber[7] and told him that Cole and Stacher were close business associates, that Cole owned hidden interests in Las Vegas gambling establishments, and that men from the hotel frequently delivered "gravy money" (money stuffed into cans under the gambling tables and never reported)—sometimes in six-figure amounts—to CFR (Pet. App. A, pp. 17a-18a; 325 F. Supp. at 770).[8] No such information had been produced by the electronic surveillance (325 F. Supp. at p. 770). Prior to Benton's disclosure to him, Farber had been receiving reports from FBI Special Agent Zellers, which were based in part on the surveillance, including a report that Cole was charging personal expenses to CFR (Pet. App. A, p. 19a). Later in the summer of 1962, Farber asked Louis Scalzo, an attorney in the Organized Crime Section of the Department of Justice, to request a "saturation" investigation of CFR by the Internal Revenue Service[9]

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[7] The government's lead to Benton was from a source independent of the illegal electronic surveillance (Pet. App. A, p. 18a, n. 15; 325 F. Supp. at 771).

[8] Benton's statement was recorded and ran over 70 pages in length (325 F. Supp. at 770).

[9] On October 3, 1962, the Department of Justice requested the Commissioner of Internal Revenue to undertake a "saturation" investigation and referred to the information that Cole was closely associated with Stacher and that he acted as Stacher's representative in connection with an undisclosed interest in a Las Vegas gambling establishment. This request contained no reference to taking deductions for personal expenses. (Pet. App. A, p. 19a.)

(Pet. App. A, p. 19a; 325 F. Supp. at 765). At the taint hearing, Farber testified that when he requested the investigation, "The Benton information and the information pertaining to the Las Vegas hidden interest was, to me, the most dramatic, and the most appealing" (Pet. App. A, p. 19a). On the other hand, he also admitted that "I * * * am sure that the other information [from the FBI reports] must have played some part" in his decision (*ibid*).

In October, November, and December of 1963, Francis S. Sullivan, an Internal Revenue agent assigned to investigate Cole's income tax matters, read the FBI reports (325 F. Supp. at 765). The analysis of CFR's records finally got under way on June 8, 1965, and continued through August 27.[10] The "saturation" investigation was conducted under the supervision of Revenue Agent Robert Zagorin. Neither he nor any

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[10] The investigation was delayed for a number of reasons. First, Farber asked agent Sullivan to hold off pending disposition of the obstruction of justice charge against Cole. (Pet. App. A, p. 21a, n. 18.) Second, after reviewing the FBI reports and other information, Sullivan informed his superior that he did not believe that there was an intelligence case on the facts contained in the reports and inquired whether the Department of Justice still wanted the case investigated (325 F. Supp. at 765-766). After a short interval, he was told to go forward with the investigation (325 F. Supp. at 766). Finally, Sullivan's attempts to examine Cole's and CFR's records were considerably delayed by legal proceedings. See *In re Cole*, 237 F. Supp. 274 (S.D.N.Y.), reversed, 342 F. 2d 5 (C.A. 2), certiorari denied, 381 U.S. 950. When the government's right to production of the records was established, the IRS was informed, for the first time, that all corporate records prior to 1963 had been destroyed (325 F. Supp. at 766).

of the agents who worked on the investigation, then or subsequently, knew of the illegal electronic surveillance or read the FBI reports. (Pet. App. A, pp. 21a-22a; 325 F. Supp. at 766.) The 1963 and 1964 corporate payment of personal expenses of Cole and Fischer, proven at trial, was uncovered in the review of the corporate books and records undertaken in the "saturation" investigation (325 F. Supp. at 771).[11]

ARGUMENT

1. Petitioners argue that admission in the government's case of the jury verdict in petitioner Cole's obstruction of justice case was error because that conviction was subsequently vacated on the ground that the government could not demonstrate that the evidence in the case came from an untainted source (Pet. 5-11).[12] This argument ignores the facts of this case and is without merit.

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[11] In such an investigation, every conceivable avenue of tax evasion is thoroughly examined (Pet. App. A, p. 20a, n. 17).

[12] Petitioners imply that the government deliberately and improperly delayed consenting to the setting aside of the prior conviction so that it could be used in this trial (Pet. 5-6). We note that, until the time petitioners introduced the trial judge's remarks, the government had consistently represented that it would not use the fact of the guilty verdict in that earlier trial (Pet. App. A, p. 11a). Moreover, the court of appeals did not accept the suggestion that the government purposely delayed in acknowledging the validity of the *coram nobis* proceeding (Pet. App. A, p. 13a, n. 11). Finally, as the court below noted, petitioners did not seek a continuance here until the *coram nobis* proceeding had been decided, or ever object to the evidence of the conviction on the ground that it was under constitutional attack (Pet. App. A, pp. 12a, 14a).

While the cases relied upon by petitioners (Pet. 7)[13] hold that a constitutionally invalid conviction cannot be used to support guilt, enhance punishment or impeach a defendant's credibility, other decisions of this Court have recognized that the defense may not unfairly take advantage of a constitutional restriction on the use of evidence in the government's possession. *Harris* v. *New York*, 401 U.S. 222; *Walder* v. *United States*, 347 U.S. at 62.[14] That is exactly the situation here. By eliciting the trial judge's remarks, the petitioners left the jury with an incomplete and misleading picture as to Benton's credi-

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[13] *Burgett* v. *Texas*, 389 U.S. 109; *United States* v. *Tucker*, 404 U.S. 443; *Loper* v. *Beto*, 405 U.S. 473.

[14] In *Harris* the defendant, charged with illegal narcotics sales, took the stand and denied selling narcotics on one occasion and testified that the other sale was of baking powder, not narcotics. On cross-examination, a prior inconsistent statement of the defendant, obtained without proper warnings as mandated by *Miranda* v. *Arizona*, 384 U.S. 436, was used to impeach him. In affirming the conviction, this Court said that "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (401 U.S. at 226.)

In *Walder*, this Court approved the use of evidence, previously suppressed because unlawfully seized, to rebut the defendant's statement on direct examination that he had never possessed narcotics. This Court there noted that "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths" (347 U.S. at 65).

See also *Loper* v. *Beto*, *supra*, 405 U.S. at 482, n. 11.

bility. Under these circumstances, petitioners cannot be heard to argue that the government's hands were tied,[15] and it was proper to allow the government to complete the picture by introducing the jury's guilty verdict as evidence on the issue of Benton's credibility.

2. Petitioners also contend that information from the illegal electronic surveillance was the motivating force in the "saturation" investigation, and that the government's trial evidence was thus tainted (Pet. 11-19).[16] Both the district court and the court of appeals extensively analyzed the facts and rejected this contention.[17] We rely upon those opinions here.

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[15] As previously noted, petitioners did not object at trial to admission of the jury's verdict on the ground that it was constitutionally invalid.

[16] We note that the acts for which petitioners were prosecuted were, with one minor exception, not committed until after the illegal electronic surveillance was terminated (Pet. App. A, p. 16a).

[17] Petitioners make a number of assertions in their petition which, although not specifically answered in the court of appeals' opinion, were challenged by the government in the court below. Thus, for example, petitioners assert that Farber requested copies of Cole's income tax returns only seven days after the conversation relating to the charging of personal expenses was overheard. The government pointed out, however, that petitioners neglected to mention that Farber did not receive the FBI report covering this conversation until after he had requested the tax returns (citing [using petitioners' system] DXT 17, GXT 19, p. 35; TH. 88). Again, petitioners recite that Sullivan, the IRS agent, met with the FBI agent in charge of the surveillance on a number of occasions when the electronic surveillance was being conducted. The

We add only that petitioners' contention that the court below, in deciding this claim, "fabricated a hypothetical test" inconsistent with the decisions of this Court and the decisions of other circuits (Pet. 12-13, 19) is frivolous. Petitioners construct this argument on language in the opinion below to the effect that the government "would have" launched its "saturation" investigation even if no information had been received from illegal electronic surveillance (Pet. 12; Pet. App. A, p. 17a). It is asserted that this language reveals that the court below substituted its own speculation for what in fact occurred (Pet. 12, 19). This assertion, however, ignores the express language of the opinion below where the court said, relying upon its prior decision in *United States* v. *Paroutian*, 299 F.2d 486, "that the question is not whether the government would have, in the normal course of events, discovered the evidence by independent legal sources, but whether in fact they did" (Pet. App. A, p. 22a). The "would have" language was used to determine the *actual* cause of the "saturation" investigation. The government demonstrated that, in addition to evidence illegally obtained, it also possessed evidence from an independent source. The evidence from the illegal source was not enough to

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government pointed out, however, that both men testified that they had never discussed Cole on those occasions (citing TH. 148, 417). Finally, petitioners set forth what a number of people thought was the basis of the investigation (Pet. 17-18). But it was Farber who had requested the investigation and he testified as to his reasons for doing so.

initiate the "saturation" investigation leading to the challenged evidence; it was the evidence from the independent source that was sufficient.[18] Thus, the discovery of evidence used at this trial was not tainted by the illegal electronic surveillance.

Neither *United States* v. *Bacall*, 443 F.2d 1050 (C.A. 9), certiorari denied, 404 U.S. 1004, nor *United States* v. *Ruffin*, 389 F.2d 76 (C.A. 7), relied upon by petitioners (Pet. 19), is in conflict with the ruling below. In *Ruffin*, the court of appeals rejected the government's argument that evidence discovered after an illegal arrest was admissible because in plain view, and noted that it was purely speculative that the defendant's offenses *would have* come to light but for the unlawful arrest. *United States* v. *Ruffin*, *supra*, 389 F.2d at 79. The statement in *Bacall* (443 F.2d at 1057) that "The question to be answered is not whether the * * * [evidence] would have been discovered in the absence of the seizure," must be read in the context. That case did not involve leads in the hands of the government both legally and illegally obtained. Rather, it involved a situation where the court assumed, in the sentence immediately preceding the quoted statement, "that illegal seizure *was* a 'but for' cause of the * * * investigation." That is clearly not the situation here. Indeed, the court

[18] Thus, the court of appeals found that whereas the charging of personal expenses to a business would not warrant a "saturation" investigation, failure to disclose the receipt of money, sometimes in six-figure amounts, from a person believed to be a figure in organized crime would warrant such an investigation (Pet. App. A, p. 20a).

in *Bacall* specifically recognized that where challenged evidence is discovered through utilization of some legally obtained leads as well as some illegally obtained leads (a situation somewhat similar to that here), the substantiality of the legally obtained leads may influence the determination of whether the evidence should be admitted. *United States* v. *Bacall*, 443 F.2d at 1056.

In short, the courts below properly determined the factual cause of the "saturation" investigation, and there is no conflict among the circuits on this point.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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COLE, FISCHER & ROGOW, INC.,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In its brief in opposition, the government fails to respond to the issues raised in the petition. An analysis of what the government says, and what it does not say, underscores the importance of the issues raised and the appropriateness of the case for certiorari.

1. The government contends that the concededly accurate reading of Judge Westover's remarks concerning Benton's credibility, introduced by the defense to mitigate the effect of highly inflammatory testimony elicited by the prosecution (see Petition, p. 9, n. 5), should be equated to

the perjury committed by the defendants in *Walder* v. *United States,* 347 U.S. 62 (1954) and *Harris* v. *New York,* 401 U.S. 222 (1971); thereby sanctioning proof of Cole's constitutionally defective prior conviction. It is the government's theory that the rule of *Burgett* v. *Texas,* 389 U.S. 109 (1967), and its progeny may be ignored—not because the defense's evidence was false or inaccurate, but—in order to permit the government to show that Judge Westover's opinion was not a shared view (Brief in Opposition, pp. 10-11).[1]

There is no authority for this proposition, and to the extent that it purports to rest on notions of fairness (see Brief in Opposition, p. 10), the equation must topple of its own imbalance: First, because it ignores the lower court's concession that the conviction itself was an "irrelevant fact" and that only one of the three inflammatory "Benton" statements introduced by the government was even marginally relevant (10a, 14a); second, because it ignores the fact that Benton did not testify at the present trial and could not be cross-examined; and third, because the government's constitutional disability resulted not from an impulsive "constable's blunder," but from 15 months of continuous illegal

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[1] It is not contended that the events below even remotely approached the circumstances present in *Harris* and *Walder.* Moreover, proof of the invalid conviction cannot be said to have "completed the picture"—even if that would be sufficient to rationalize its use—because the California jury could have convicted Cole without believing the substance of the Benton "statements" presented to the jury here; indeed, the reference to Nate Stein related to an incident years earlier in which Cole was not involved in any way; and one of the "statements" referred to a conversation seven years prior to the events in question at the California trial.

activity and 10 years of active concealment.[2]

But the fundamental fallacy in the government's argument is that it amounts to no more than the construction of what might have been a legitimate purpose for admissibility if the conviction had been *valid,* even though Cole did not testify or otherwise put his character in issue. Basic to the holdings of *Burgett* v. *Texas, supra, United States* v. *Tucker,* 404 U.S. 443 (1972), and *Loper* v. *Beto,* 405 U.S. 473 (1972), however, is the principle that legitimacy of purpose does not overcome the renewed deprivation where the prior conviction is constitutionally invalid.[3]

2. Implicitly conceding that the "taint" of its focus and trial evidence must be measured by what actually occurred, rather than what "would have" occurred if it had obeyed the law, the government contends that the court below did not apply a "would have" standard. For its principal sup-

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[2] The government suggests that petitioners did not preserve the point because they did not move for a continuance or at least object that the *coram nobis* proceeding was pending (Brief in Opposition, p. 9, n. 12). However, trial counsel's entry into the case was on condition that no continuance would be sought, and the trial judge was aware that the conviction was under attack (R. 331a-334a). In any event, any such "waiver" argument is necessarily foreclosed by *Loper* v. *Beto,* 405 U.S. 473 (1972).

The government also urges that its consent to the *coram nobis* petition was not given until after the verdict here because it then "discovered" additional records (Brief in Opposition, p. 3, n. 2). There is no support for this statement. In its *unsworn* consent, the government stated merely that it had "reviewed" additional records (always in its possession), and gave no indication whether this had occurred before or after commencement of trial or verdict here (R. 252a-253a).

[3] As in *Loper,* "This is not a case where the record of a prior conviction was used for the purpose of directly rebutting a specific false statement made from the witness stand." 405 U.S. at 482, n. 11.

port, the government points to the fact that the court below said that its holding did not undermine the "would have" prohibition "because we find that the Government proved that the evidence resulted from the legal saturation investigation" (22a). This conclusion, however, resulted from the lower court's premise that "the 'cause' of the saturation investigation" was the Benton statement. *(Ibid.)*.

The crux of the error below and the central flaw in the government's position here is that in determining the "cause" of the saturation investigation—*i.e.*, of the government's focus on petitioners—the lower court applied the very standard it and the government say was rejected as improper: It held the government to a burden of showing only that the saturation investigation "would have" been launched even if no information had been received from illegal electronic surveillance (17a). The lower court did *not* require the government to show that the *actual* cause of its investigation—and the ultimate cause of its trial evidence—was in fact information lawfully in its possession.[4]

That the lower court applied a hypothetical test in arriving at its conclusion is clear from the government's reliance—not on any analysis of what in fact "caused" the

[4] The government states that the illegal surveillance occurred prior to the acts for which petitioners were prosecuted, implying a lack of any relationship between the surveillance and the prosecution (Brief in Opposition, p. 11, n. 16). This misses the point. Petitioners were charged, as the court below noted (6a), with "a *pattern* of having CFR take deductions for personal expenses of Cole and Fischer," precisely the pattern of conduct revealed by the illegal eavesdropping. And in suggesting that there was no interagency contact during the surveillance (Brief in Opposition, p. 11, n. 17), the government overlooks a contemporaneous IRS memorandum reciting that "Cole's activities are the subject of conferences with the F.B.I. and U.S. Attorney's Office" (DXT P).

saturation investigation, but—on the lower court's speculations as to the circumstances in which saturation investigations would be warranted and those in which they would not (Brief in Opposition, p. 13, n. 18). That the court below applied the erroneous "would have" standard is perhaps most evident, however, from its rejection of Farber's testimony that his request for the investigation resulted from both legal *and* illegal information.[5] Notwithstanding that testimony, the lower court simply concluded he *would have* sought the investigation even if there had been no illegally obtained information (20a).[6]

The opinion of the court below leaves no room for doubt that it reached its conclusion only by the application of a hypothetical and erroneous "would have" test.

[5] As noted in the Petition (pp. 13-14, n. 7), there is grave doubt that, in selecting Farber, the government produced the proper witness.

[6] Also rejected—and unmentioned—in favor of speculation that a saturation investigation "would have" been ordered even if there had been no illegal information were the undisputed facts that (a) the IRS Chief of Intelligence, in a memorandum contemporaneous with the investigation, wrote that the source of the investigation related to information from illegal sources (DXT AH-1; Appendix E to the Petition, 27a-28a); (b) the IRS Agent in charge of the investigation testified that the request for the saturation investigation was based on information derived from the illegal bug (TH. 230), and (c) there never was any investigation—saturation or otherwise—of the legally derived information—only the illegally obtained leads were pursued.

We note the government's reliance on the formal written request for the saturation investigation referring only to the legally derived information (Brief in Opposition, p. 7, n. 9), We note, too, that every other pertinent document referred solely to the illegally derived information, and that immediately prior to the formal written request, a series of inter-agency airtels instructed the U.S. Attorney to open a new file relating to Cole in order to conceal the existence of illegally obtained information (see Petition, pp. 16-18; 29a-40a).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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